A. O. Smith Corporation *and* Anton Kiefer

Smith Steelworkers, Local 19806, AFL–CIO *and* Anton Kiefer. Cases 30–CA–3146 and 30–CB–804

January 11, 1977

DECISION AND ORDER

Upon a charge filed by Anton Kiefer, an individual, on May 15, 1975, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 30, issued a complaint and notice of hearing on September 11, 1975, against A. O. Smith Corporation, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(3) and (1) and 2(6) and (7) of the National Labor Relations Act, as amended. On the same date, the General Counsel, by the Regional Director for Region 30, issued another complaint and notice of hearing also based on a charge filed by Anton Kiefer on May 15, 1975, as amended on September 8, 1975, against Smith Steelworkers, Local 19806, AFL–CIO, alleging that it had and was engaging in unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the Act. The General Counsel, by the Regional Director for Region 30, issued an order consolidating the cases on September 11, 1975, as well. Respondents timely filed answers to the respective complaints, denying the commission of unfair labor practices.

Between October 24 and 28, 1975, the parties entered into a stipulation in which they agreed that the formal papers filed in this proceeding and the facts contained in the stipulation, together with the exhibits attached thereto, constitute the entire record in this case. The parties waived their right to a hearing before an Administrative Law Judge and the issuance of an Administrative Law Judge's Decision and recommended Order. The parties requested that the case be transferred directly to the Board for decision. The stipulation also provided for the filing of briefs with the Board.

On November 10, 1975, the Board issued an order approving the stipulation and transferring the proceeding to the Board. Within the time limit set by the stipulation, the General Counsel and each Respondent filed a brief with the Board.

Having accepted transfer of this proceeding to it, the Board makes the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent A. O. Smith Corporation, herein referred to as Smith, is now, and has been at all times material herein, a New York corporation engaged in the manufacture of automobile frames at its facilities located in Milwaukee, Wisconsin. During the past 12 months, Respondent Smith, in the course and conduct of its business operations, shipped and sold goods valued in excess of $50,000 directly to points located outside the State of Wisconsin.

We find that Respondent Smith is now, and has been at all times material herein, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

We find that Respondent Smith Steelworkers, Local 19806, AFL–CIO, herein referred to as the Union, is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent Smith manufactures automobile frames at a plant located in Milwaukee, Wisconsin. Smith has entered into a successive series of collective-bargaining contracts for at least 28 years with Respondent Union. All such labor contracts between Smith and the Union, including the one currently in force, have contained a union-security clause requiring all new unit employees represented by the Union to become union members no later than 30 days after hire or date of contract execution, whichever is later. However, only the most recent collective-bargaining agreement, effective from August 1, 1974, until at least July 31, 1977, has included a dues-checkoff provision. Otherwise, all relevant portions of the contract have remained exactly the same.

The complainant, Anton Kiefer, was hired by Smith on September 25, 1967, for a job included within the Union's bargaining unit.[1] Kiefer subsequently joined the Union within the time prescribed by the labor contract. Thereafter, as a bargaining unit and union member, Kiefer paid dues to the Union on a quarterly basis from 1967 until 1973. However, Kiefer failed to pay dues for the months of January, February, and March 1973, even though he was actively employed in the bargaining unit.

[1] Kiefer's seniority rights commenced from October 2, 1967.

Effective April 1, 1973, Kiefer was offered and accepted a position as a supervisor at Smith.[2] Also on April 1, Kiefer was expelled from the Union because he had not paid dues for the first 3 months of 1973. This action was taken pursuant to the union constitution and bylaws, which provide that any member who falls 2 months in arrears with his dues, and who fails to place himself in good standing within 1 month thereafter, must be automatically expelled. To become a member in good standing again, all back dues and assessments must be paid, plus a $15 reinstatement fee.

At his own request, Kiefer appeared before the Union's executive board on April 24, 1973, to contest his having to pay a reinstatement fee on the ground that he no longer occupied a bargaining unit position. The executive board rejected this argument. Consequently, Kiefer paid both his dues arrearage and the reinstatement fee on April 27, 1973, and was then considered to be in good standing and received a withdrawal card.[3]

Due to lack of work, Smith removed Kiefer from his supervisory position, effective March 16, 1974, and returned him to the bargaining unit. In accordance with the collective-bargaining agreement, Kiefer returned to the unit with his prior and accumulated seniority as a unit employee. Moreover, Kiefer benefited from a contract clause permitting supervisors returning to the bargaining unit to receive unit seniority of up to 1 year for time employed as a supervisor.[4]

Kiefer performed work as a bargaining unit employee in excess of 40 hours during the months of March and April, 1974. Effective April 15, 1974, he was again offered, and accepted, a supervisory position. Kiefer, however, failed to tender or pay to the Union any monthly dues for the months of March and April.

On June 1, 1974, in accordance with its constitution and bylaws, the Union expelled Kiefer for not paying March and April dues. Smith was notified of Kiefer's expulsion from the Union by letter dated June 22, 1974, and again by letter dated October 18, 1974. The Union also mailed a copy of the October 18 letter directly to Kiefer. Both letters stated that Kiefer would not be eligible to be reinstated in the Union's jurisdiction due to his expulsion. The second letter requested that Smith notify Kiefer that he must pay up the amount due by October 31, 1974, to be eligible for reinstatement.

Thereafter, on or about October 23, 1974, Smith sent Kiefer the October 18, 1974, letter from the Union, along with a memo of its own. The memo suggested that Kiefer meet the dues obligation, because if anything happened to cause him to have to return to the unit Kiefer would not be able to return except as a new hire, and then only if an opening existed.

Kiefer received this memo from Smith with the attached letter from the Union. Meanwhile on October 21, 1974, Kiefer had returned his copy of the Union's letter to the Union, with a notation asking why he had not previously been informed of his expulsion and asking how much money he owed. In reply, the Union sent Kiefer a letter on November 6, 1974, which he received, stating that Kiefer would have to pay the Union $29 (representing back dues and the reinstatement fee) by November 14, 1974, if he wanted to receive a new withdrawal card.[5] Otherwise, the letter stated, Kiefer would not be eligible to return to the unit because he had not left the Union in good standing. Kiefer did not respond to the Union's November 6, 1974, letter.

On or about March 20, 1975, Kiefer was informed by Smith that there would be a supervisory reduction which would affect him. The next day, Kiefer went to the Union's offices and spoke to the secretary-treasurer, Clara Streicher. Kiefer offered to pay his back dues, plus a reinstatement fee, to enable him to return to the bargaining unit. Streicher rejected this tender on the ground that it was untimely, and refused to reinstate Kiefer in the Union. Thereafter, on or about March 23, 1975, Kiefer wrote to the Union requesting an opportunity to plead his case before the Union's executive board.[6]

Kiefer continued to work as a supervisor until April 15, 1975, when he was removed due to lack of work. Smith would have returned Kiefer to the bargaining unit, except for the fact of Kiefer's expulsion from the Union. Smith was also unable to hire Kiefer as a new employee, because some 1,100 bargaining unit employees with seniority rights were on layoff at the time.

Smith and the Union, for as long as they can recall, have engaged in a practice pursuant to, although not explicitly contained in, the labor contract, under

[2] It has been Smith's practice to offer supervisory positions to bargaining unit members when, in Smith's judgment, the need for such positions arises. Bargaining unit members do not, however, have to accept such positions when offered.

[3] Under the union constitution and bylaws, a union member transferring from the unit to an exempt classification must pay his dues to date and take out a withdrawal card.

[4] The contracts between Smith and the Union have contained seniority provisions for at least the past 28 years preserving the seniority rights of employees who leave the unit to become supervisors, and permitting employees promoted to supervisor to accrue either full or limited seniority within the bargaining unit for the time so employed

[5] The union letter stated that the withdrawal card which Kiefer had been issued on April 27, 1973, had been canceled when he returned to the bargaining unit on March 16, 1974.

[6] By letter dated April 23, 1975, the Union denied Kiefer's request to appear before the executive board.

which supervisors returning to the bargaining unit must be union members in good standing as of the day they reenter the unit. Smith and the Union do not treat returning supervisors as new employees, and they do not give such individuals 30 days to join the Union, as all new employees receive. Instead, Smith and the Union expect supervisors returning to the unit to be obligated for union dues for the month in which they reenter the unit, if they work more than 40 hours in that month in the unit. The Union has never sought, however, to have Kiefer pay money to it for the period during which he served as a supervisor.

There is no set time limit established by the Union, either under its constitution and bylaws or through practice, during which reinstatement fees and dues must be tendered by an expelled member to reacquire membership. The Union has previously accepted tenders from supervisors who have been expelled for nonpayment of dues and reinstatement fees. Kiefer's situation is the first time the Union has refused to accept a tender of reinstatement fees and dues from an expelled member trying to reenter the bargaining unit. It is also the first time Smith has refused to return a supervisor to the bargaining unit based on the supervisor not being a union member in good standing. Kiefer was not the first bargaining unit member who had been expelled twice for dues arrearages but was the first supervisor attempting to return to the unit who had been expelled twice for arrearages.

The General Counsel asserts that these facts make out violations of the Act by Respondents under our decision in *Local Union 399, International Brotherhood of Electrical Workers, AFL–CIO (Illinois Bell Telephone Company),* 200 NLRB 1050 (1972), enfd. 499 F.2d 56 (C.A. 7, 1974). *Illinois Bell* decided that when a bargaining unit member leaves the unit to become a supervisor he loses his status as an "employee," as defined in the Act, and thus must be treated as a "new" employee for union-security purposes upon returning to the unit. This is true even though the returning supervisor is entitled to retain his prior accumulated unit seniority upon reentry into the unit.

Therefore, the General Counsel concludes that Smith and the Union unlawfully conditioned complainant Kiefer's reemployment in the bargaining unit in April 1975, with accumulated seniority rights, upon his failure to pay dues and a reinstatement fee for a period in which he had no statutory obligation to pay; i.e., March 16 to April 15, 1974. Specifically, the General Counsel declares that, since Kiefer was a new statutory employee on March 16, 1974, the Act required that he be given 30 days in which to join the Union. Because 30 days had not elapsed by the time Kiefer again became a supervisor, it is General Counsel's position that Kiefer accrued no dues obligation for that period.

The General Counsel further claims that Smith's and the Union's refusals to reinstate Kiefer to the bargaining unit stemmed from a jointly maintained practice, requiring supervisors returning to the bargaining unit—even those with no outstanding union dues obligation—to be union members in good standing as of the date they return to the unit, and to pay dues for each month in which they perform bargaining unit work in excess of 40 hours. General Counsel argues that this practice is itself unlawful under *Illinois Bell.*[7]

Respondent Union submits that Kiefer received the statutory grace period of 30 days to join the Union when he was initially hired in 1967. Since Kiefer decided to join at that time, the Union claims that he became obligated to pay dues for each month in which he worked more than 40 hours in the unit.[8] The Union also insists that Kiefer cannot be considered a "new" employee since he had accumulated more than 6 years of rights and benefits, including seniority, as a unit employee at the time he desired to return to the unit. Furthermore, the Union relies on *Metal Workers' Alliance, Incorporated (TRW Metals Division, TRW, Inc.),* 172 NLRB 815 (1968), in which we approved enforcement, through a union-security clause, of a union requirement that supervisors or others returning to the unit pay disparate reinstatement fees based on the length of time worked outside the unit.[9]

Respondent Smith also emphasizes the decision in *Metal Workers,* arguing that our approval of graduated reinstatement fees for individuals reentering the unit, based on the fact that they retained prior accumulated unit seniority, supports a distinction

[7] The General Counsel asserts, also, that since the union constitution and bylaws do not set a time limit for tender of reinstatement fees and dues, Kiefer's tender in March 1975 should not have been rejected as "untimely." The General Counsel argues that, since Kiefer's case was the first in which the Union had refused to accept such a tender from an expelled member, and since the Union had previously accepted tenders from supervisors who had been expelled from membership, a violation is also established from these facts. We cannot consider this contention, however, since it is plainly outside the scope of the allegations made against Smith and the Union in the complaints.

[8] The Union notes that it did not require Kiefer to pay another initiation fee when he returned to the unit in March 1974, but under the General Counsel's theory Kiefer, as a "new" employee, would be subject to a second initiation fee.

[9] As an affirmative defense, the Union raises the 6-month statute of limitations contained in Sec. 10(b) of the Act. It argues that Kiefer's expulsion from the Union on June 1, 1974, or at least his awareness of his expulsion and its consequences on October 18, 1974, extinguished his "employee" rights. Therefore, the Union contends that the filing of charges against Smith and the Union on May 15, 1975, was time-barred We reject this contention for the reasons stated in *Chauffeurs, Teamsters and Helpers "General" Local No. 200, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (State Sand and Gravel Company; Hillview Sand and Gravel, Inc),* 155 NLRB 273 (1965), enfd 63 LRRM 2032, 53 LC ¶11,326 (C.A.D.C., 1966), cert. denied 385 U S. 929.

between "new" employees and "returnees." Therefore, according to Smith, *Metal Workers* controls this case, not *Illinois Bell.*

Conclusions

We do not believe that application of the *Illinois Bell* rule is warranted under the facts of this case. As a general principle, requiring that supervisors returning to the bargaining unit be treated as "new" employees for union-security purposes is sound. We must, however, be careful to distinguish cases in which the line between "supervisor" and "employee" is not so clearly drawn as it was in *Illinois Bell.*

The stipulation discloses that Kiefer, originally a bargaining unit and union member for 5-1/2 years, worked as a supervisor for about a year before returning to the unit to work for 29 days and then becoming a supervisor once again for another year. The record also shows that Smith has followed a practice of offering supervisory positions to unit members when it finds there is a need for such positions, and that Smith and the Union have jointly required supervisors desiring to return to the unit to be union members as of the date of return. Smith's collective-bargaining contracts with the Union, for at least the past 28 years, have contained provisions preserving the seniority rights of employees who leave the unit to become supervisors and permitting employees promoted to supervisor to accrue either full or limited seniority for the time so spent. Finally, Smith informed Kiefer that he would have to meet his union dues obligation, because if anything happened to cause Kiefer to need to go back to the unit he would not be eligible to return because he had been expelled from the Union.

These facts firmly establish that individuals employed at Smith often shuttle back and forth between unit and supervisory functions.[10] In such circumstances, it would be unfair, as well as contrary to the intent of the union-security proviso to Section 8(a)(3), to permit returning supervisors, with all their accrued seniority rights, to take an unlimited number of 30-day "free rides" when they come back to their former positions in the bargaining unit. The purpose of this proviso is to give unions the opportunity to insure their financial viability by, at least, requiring employees to pay the equivalent of dues to the union after an initial period of free choice; the proviso was not intended to be used as a vehicle to circumvent the payment of union dues during later periods of bargaining unit employment.[11] To hold otherwise would be to allow these individuals to have their cake and eat it too. For the reasons set forth below, we think that one "free ride" is enough.

The proper test to be applied here is whether there is a reasonable expectancy that when an individual becomes a supervisor he may soon return to the unit. This is the same type of analysis we undertake in deciding whether laid-off employees, or supervisors who have been returned to the unit, should be eligible to vote in a Board-conducted election.[12] In those cases, our task is to determine, under all the objective facts and circumstances in the record, whether there is a reasonable expectancy that an individual will return to the unit from layoff status, or whether a former supervisor will return to his old position after being demoted to the unit.

Because the facts in this case suggest frequent movement of individuals back and forth between unit and supervisory jobs, we must conclude that there is a reasonable expectancy that an individual becoming a supervisor will return to the unit. Therefore, we cannot agree with the General Counsel that Kiefer accrued no dues obligation for the 29-day period in which he worked in the unit between supervisory assignments.[13]

We also note that the Union sought dues from Kiefer only for the period of time in which he was actively employed in the bargaining unit, and required no new initiation fee of him to reenter the unit. The Union gave Kiefer ample opportunity to meet his dues obligation and to regain his union membership in good standing. He steadfastly refused to do so until his employment status was in clear jeopardy. After indulging Kiefer to this extent, it would have been grossly inequitable for the Union and Smith to have permitted Kiefer to return to the unit in April 1975, thus moving him ahead of 1,100 laid-off employees possessing valid seniority rights.

There is also no doubt that Kiefer was aware of the longstanding practice between Smith and the Union requiring supervisors returning to the unit to be union members in good standing as of the date they return to work in the unit. In fact, Kiefer paid up back dues he owed the Union in April 1973, even though he was a supervisor at the time. Kiefer evidently wanted to obtain a withdrawal card and achieve good standing with the Union as insurance against the day he might lose his supervisory job. Thus, Kiefer obviously knew that it was likely he would be sent back to the unit at some point.

[10] This situation is thus quite unlike that in *Illinois Bell,* in which there was no evidence to suggest frequent movement of bargaining unit members to and from supervisory jobs. Thus, unlike *Illinois Bell, supra,* it cannot be said here that Kiefer assumed his supervisory position, "with a bona fide intention of not returning [to a unit position]."

[11] It should be pointed out that Kiefer received his 30-day statutory grace period when he was first employed by Smith in 1967.

[12] *Higgins, Inc.,* 111 NLRB 797 (1955).

[13] We therefore find it unnecessary to rely on our decision in *Metal Workers, supra.*

Our dissenting colleague argues that "Kiefer was entitled to be treated as a 'new' employee, having returned to the unit from supervisory status . . . ." and thus was entitled to exemption from dues for the period from March 16 to April 15, 1974. We do not disagree with this. But "new" employees have no carryover seniority, and in Kiefer's case this meant no job. What Kiefer was seeking was not treatment as a "new" employee, but as one who retained his ties to the unit in order to carry over his seniority which would assure him a job, and at the same time avoid the financial obligation attendant upon retaining such seniority in the unit. Our colleague would permit this, which accords Kiefer not the "new employee" status on which he rests his argument, but a treatment far different and better—at the expense of those who had borne the financial burdens of supporting and maintaining, during Kiefer's tour of duty as a supervisor, the seniority system of which he now seeks to take advantage.

We therefore find that the Respondents did not violate the Act by requiring Kiefer to pay union dues for the period in which he was actually employed as a bargaining unit member, and conditioning his reemployment rights, with accumulated seniority, in the unit on his failure to pay such dues, and we shall dismiss the complaints herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaints herein be, and they hereby are, dismissed in their entirety.

CHAIRMAN MURPHY, concurring:

I concur in the dismissal of the complaint for the following reasons.

The contract between Smith and the Union contains provisions preserving the seniority rights of employees who leave the unit to become supervisors. Smith and the Union have long had the practice pursuant to the contract of reinstating supervisors to the bargaining unit only if such individuals are members of the Union in good standing as of the date they return to work in the unit. Supervisors returning to bargaining unit jobs are not treated as new employees but are obligated to pay dues for the month within which they return to the unit if they work more than 40 hours in that month in the bargaining unit. Under the union constitution and bylaws, a member transferring from the unit to an exempt classification must pay his dues to date of transfer and take out a work withdrawal card. There is no requirement that they make any payments to the Union for the period they are absent from the bargaining unit.[14]

In these circumstances, I would treat the practice of the parties under their contract as tantamount to an agreement or arrangement between them to grant an indefinite leave of absence from the unit to employees promoted to supervisory status so that they will be able to retain their unit seniority and attendant rights in the event of their return to the unit.[15] So viewed, they automatically revert to their former employee status immediately upon return to the unit and, consequently, like other employees who never left the unit to become supervisors, must comply with the contractual obligation of being in good standing in the Union. I am, therefore, unable to perceive anything unlawful in this arrangement. I also believe that by viewing the situation in this light we avoid the necessity of determining whether employee-supervisors have a reasonable expectancy of returning to the unit, as advanced by two of my colleagues in the majority, and, of course, of engaging in the dissent's fiction that the parties must treat these individuals as "new" employees for union-security purposes, despite their continuous employment relationship with Smith.[16] Instead, by deeming them to be on leave of absence from the unit, subject only to the requirement that they meet their responsibilities to the Union for those periods when they are working as *unit employees*, I believe that we have achieved an appropriate balancing of the various interests involved herein.

My dissenting colleague mischaracterizes my position by asserting that I have confused the statutory definition of "employee" with the term's "colloquial" usage. Nowhere, however, have I stated that a supervisor is an employee within the meaning of the Act. The phrase "despite their continuous employment relationship with Smith" is recognition of nothing more than that the individuals in question continue to be on Smith's payroll.

MEMBER FANNING, concurring:

I concur in the dismissal of the complaint. I do so for the reasons that follow.

The issues in this case are whether (1) an employer and a union may provide that an employee who leaves the bargaining unit for a supervisory position may be returned to the unit at a later time with the same employment status enjoyed by him at the time

[14] Cf *Kaiser Steel Corporation*, 125 NLRB 1039 (1959).

[15] The arrangement obviously was reached in recognition that it is not unusual for employees to be promoted to supervisory positions only later to be returned to the unit by circumstances beyond their control, as in Kiefer's case, and that it would be unfair to penalize them for accepting a promotion in such circumstances by depriving them of previously earned seniority rights.

[16] To the extent that *Illinois Bell* may be inconsistent with my view herein, I would not adhere to it.

he left, and (2) the parties may require, as a condition to his resumption of employment in the unit with seniority status intact or enhanced, acceptance and fulfillment of all valid outstanding union dues obligations applicable to him at the time he left. In short, must the parties, while according him his full prior employment status, as provided for in their agreement, treat him as a new employee for purposes of the union-security obligations, thus giving him an additional 30-day grace period in which to decide whether he will work in the union shop every time he returns to unit employment.

The answers to these questions seem to me self-evident. Quite clearly whether employees shall have the right to leave and return to the unit with their full seniority rights upon return is a fit and natural subject for collective bargaining, affecting, as it does, the terms and tenure of employment not only of those employees who have the opportunity to take advantage of such provisions, but of other employees as well. Moreover, providing such rights[17] may be of substantial advantage to the employer in his quest for responsible supervisors, and collective bargaining provides the method by which an appropriate balance may be struck among the many competing considerations bearing on the question of whether and on what conditions such rights shall or shall not be granted. Neither the dissenting opinion nor the decisions cited therein dispute or reject this view, and it seems to me that *Metal Workers' Alliance*[18] is authority for the proposition that the contracting parties may provide for the continuation of such employment rights and ties to the unit during supervisory status.

But, if that is a proper answer to the first question, it seems to me that the answer to the second question must be in the affirmative. For the fact of the matter is that the employee-supervisor-employee returns to the unit not as a new employee but as a senior employee exercising rights accruing by virtue of past employment in the unit and contractual provisions recognizing and guaranteeing that employment status. If the parties may contractually provide for such continuing employee status, I see no obstacle in the statute to conditioning the exercise of the right to such employment on the performance of the same union-security obligations validly imposed on other employees in the unit. The statute in the proviso to Section 8(a)(3) authorizes union-security clauses which "require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later."[19] It is essentially a question of fact as to whether the employee returns to the unit as a new employee or as one with an ongoing interest in the unit even during his period of work as a supervisor.[20]

The cases cited by the dissent, though cited for a contrary view, are for the most part supportive of this proposition. Thus, in both *Idarado Mining Company*,[21] and *Yellow Cab Company*,[22] the Board found that employees who had left their employer's employ to take employment elsewhere had severed their employment relationship and therefore returned as new employees, and that, accordingly, it was contrary to the statute to enforce a maintenance-of-membership clause in the one case and a union-security clause in the other against those employees as if they had a continuing relationship to the unit; they were regaining employment as new employees, and had to be treated as such. But, even in those situations, the Board noted that the parties to the contract in *Idarado* "might have made provision for the present situation in their agreement. But as we read the maintenance-of-membership clause, they did not do so. The obligation under the contract to remain a member in good standing of the contracting union rested on *employees*."[23] Again in *Yellow Cab Company*, the Board noted that "The governing contract in each instance [as in *Idarado*] is the measure of the employee's responsibility."[24] Even in *Illinois Bell*, which is closer to the facts in this case,[25] the Administrative Law Judge's crucial finding of fact, affirmed by the Board, was wholly consistent with this view:

[17] Member Penello's view that the arrangement between Smith and the Union is beneficial to only the contracting parties and not to employees reflects an exceedingly superficial appreciation of the extent and nature of the rights and interests protected by such arrangements.

[18] 172 NLRB 815

[19] If the collective-bargaining agreement guaranteeing the right to return to the unit with full seniority rights contained no union-security clause and such a clause is added during the supervisory stint of an individual, he would clearly be entitled to a 30-day grace period upon his return to the unit as the effective date of the contract would be later than the beginning of his employment.

[20] It is not unusual for individuals moving from employee to supervisor to employee status to be treated as employees for some purposes during the supervisory tenure. Indeed, the Board has permitted such "supervisor-employees" to vote in Board elections during their supervisory service. See, e.g., *The Great Western Sugar Company*, 137 NLRB 551 (1962) See also *Northern Nevada Chapter, National Electrical Contractors Association and Represented Employers*, 131 NLRB 550 (1961).

[21] 77 NLRB 392 (1948).

[22] 148 NLRB 620 (1964).

[23] 77 NLRB at 393.

[24] 148 NLRB at 624

[25] *Local Union 399, International Brotherhood of Electrical Workers, AFL–CIO (Illinois Bell Telephone Company)*, 200 NLRB 1050 (1972), a case which involved application of a maintenance-of-membership clause rather than a union-security clause. Galka, the individual involved, had not maintained his union membership during his stint outside the unit with no objections from the union despite notice thereof. When he came back to the unit, the union waited some 14 months before actively attempting to enlist him in the union again, and then attempted to have him pay back dues for those 14 months or be discharged. Though I did not participate in *Illinois Bell*, and have difficulties with the reasoning of the decision, I have no particular quarrel with the result on the particular facts.

> Applying the above principles [derived from *Idarado* and *Yellow Cab Company*] to the facts of this case, I find that when Galka left the bargaining unit in March 1968, to take a supervisory position with the Company, he did so with a *bona fide* intention of not returning, that his obligation to retain his membership in the Union under the collective bargaining agreement ceased as of that time, and that, upon his return to his job within the bargaining unit in February 1969, he was in the position of a new employee, with no obligation under the contract to resume the payment of union dues.[26]

The key to decision in cases such as this is the nature of the employment status claimed by the returning employee. That is essentially a factual question governed largely by the status conferred on him by the collective-bargaining agreement under which he claims such employment. Where such agreement accords him seniority rights and other benefits earned by virtue of past employment, it is certainly contrary to fact to say he is a new employee, or that his status is the same as that of an applicant for employment. To treat him as a new employee as a matter of law, as the dissent does, requires, or so it seems to me, a demonstration that some overriding statutory policy requires the creation of the fiction that he is in fact a new employee. The dissenting opinion points to no such policy. The policy the dissent is ostensibly furthering is that of permitting employees a 30-day grace period in which to choose whether or not to work in the union shop established by lawful agreement between their employer and the union. Kiefer was given such a period in which to make that determination. He chose to work in the union shop and to take advantage of collectively bargained provisions allowing him to become a supervisor and to bump back into the unit with seniority intact, and even enhanced by such service, knowing full well that such rights were conditioned on his accepting and fulfilling the union-security obligations of the contract when he returned to the unit.

Here Kiefer did not fulfill his dues-paying obligation during his last stint in the unit. He was given more than a reasonable opportunity to remedy that failure—indeed, this was the second time he had failed in these obligations—and was given the opportunity to make up the delinquency. He procrastinated and thus lost his eligibility for reemployment in the unit other than as a new employee.

As Members Jenkins and Walther note, Kiefer was in fact relegated to the status of an applicant for employment, which was not a denial of employment to him but simply a relegation to a position behind the 1,100 employees on layoff status with seniority rights. He may yet be able to gain employment in the unit, and when he does he will be entitled to another 30-day grace period before he starts paying dues again to the Union. His right to be treated as a new employee, as the dissent insists is his right here, is not being, nor has it been, defeated.

MEMBER PENELLO, dissenting:

I disagree with Members Jenkins' and Walther's decision to dismiss the complaint against Smith and the Union for four reasons. First, this case is indistinguishable from *Illinois Bell,* which was correctly decided. Second, it is not proper to apply the "reasonable expectancy" test where statutory requirements are involved. Third, the facts of this case do not satisfy the "reasonable expectancy" test under established Board precedent in any event. Fourth, the so-called "free rider" problem can be solved without upsetting *Illinois Bell,* because any union can simply amend its constitution to charge higher reinstatement fees for individuals returning to the unit, in accordance with the Board's decision in *Metal Workers' Alliance, Inc.*[27]

The holding in *Illinois Bell* can best be summarized in this way.[28] The Act, including the union-security proviso to Section 8(a)(3), applies only to employees as defined in Section 2(3). A supervisor is not such an employee. As a result, when a bargaining unit member, who is subject to a union-security clause, becomes a supervisor, his obligation to remain a union member ends because he is no longer a statutory employee. Therefore, a supervisor returning to the unit is as much a "new" employee, for purposes of the proviso, as an initial hire. Thus, he must receive the 30-day grace period provided for in Section 8(a)(3) to decide whether to join the union.

The Board reached this conclusion by drawing an analogy to cases in which it held that employees leaving the employ of the employer and subsequently returning to work for that employer must be treated as "new" employees under the Act, because they had

[26] 200 NLRB at 1053

[27] 172 NLRB 815 (1968).

[28] The particular facts in *Illinois Bell* were as follows: the collective-bargaining agreement between the company and the union contained a maintenance-of-membership clause. Robert Galka went to work for the company in 1959, and joined the union the following year In 1968, Galka accepted a supervisory position. Shortly after becoming a supervisor, he told the union steward that he wanted his dues stopped, since he was no longer in the union. The steward agreed to take care of the matter, and Galka had no further contact with the union while a supervisor. About 1 year later, Galka returned to the unit, receiving the benefit of his prior accumulated unit seniority upon reentry, as provided in the collective-bargaining contract. Fourteen months after coming back to the unit, the union demanded that Galka pay back dues for the entire period since his return to the unit. Galka eventually paid under protest. Thereafter, the company filed charges against the union, alleging violations of Sec. 8(b)(1)(A) and 8(b)(2) of the Act, which the Board sustained.

no obligation to maintain union membership as nonemployees.[29] Plainly, there is no difference whether someone is not an employee under the Act because he is not working at all for the employer, or because he has become a supervisor.

To determine whether *Illinois Bell* is truly distinguishable from the instant case, it is necessary to ascertain whether the key elements composing the *Illinois Bell* holding are also present here. Complainant Kiefer worked from 1967 until April 1, 1973, as a member of a bargaining unit covered by a union-shop clause in the collective-bargaining agreement. As such, Kiefer was an employee within the meaning of the Act and was also required to pay union dues pursuant to the union-shop provision. In April 1973, Kiefer was promoted to supervisor and remained in that position until being returned to the bargaining unit on March 16, 1974, due to lack of work. During this period of supervisory service, Kiefer clearly had no obligation to remain a member of the Union in good standing. On April 15, 1974, Kiefer again was promoted to supervisor. Thus, during the critical period of 29 days from March 16 to April 15, 1974, for which the Union claims dues from him, Kiefer was entitled to be treated as a "new" employee, having returned to the unit from supervisory status, and could not have accrued any dues obligation during that time. In no material respect, therefore, is this case different from *Illinois Bell.*

Members Jenkins and Walther, however, seek to distinguish *Illinois Bell* on the basis that Kiefer had a "reasonable expectancy" of returning to the bargaining unit after becoming a supervisor. This "reasonable expectancy," in turn, is founded on the contention that the record shows frequent movement back and forth between unit and supervisory jobs at the Smith plant.

I reject such a test as a valid ground for dismissing the complaints in this case. In the first place, the Board has applied the "reasonable expectancy" rule only in representation matters, in which it exercises administrative authority over the conduct of elections.[30] The Board is not faced in such cases with a statutory question; i.e., whether certain individuals should be allowed to vote depending on whether they are employees. There is no doubt that they are employees. What is decided is whether laid-off employees, or exsupervisors now working in the unit, should be eligible to vote in an election, depending on the likelihood that they will return to the unit or to supervisory status in the near future. The Board undertakes such inquiries in order to insure that only employees with a sufficient interest in the outcome of an election are permitted to vote.

So, the institution by the Board of a "reasonable expectancy" rule, and a case-by-case application of it, is a proper exercise of its administrative discretion in overseeing representation elections. But there is no justification for importing this criterion into the unfair labor practice area, in which the Board is charged with seeing that statutory rights are protected and violations remedied. Congress requires that all "new" employees within the meaning of the Act receive 30 days, after starting employment or after the effective date of the collective-bargaining agreement, to decide whether to join a union having a union-security clause in its labor contract. This being so, the Board may not decide to enforce provisions of the statute selectively, based on "reasonable expectancies," as if it were dealing with a matter wholly within its administrative control.

Not only is it improper to apply a "reasonable expectancy" test in the instant case, but the facts do not even bear out the existence of a "reasonable expectancy" as defined in past Board cases. A brief examination of those facts relied on by Members Jenkins and Walther to show that "individuals employed at Smith often shuttle back and forth between unit and supervisory functions," and thus that a "reasonable expectancy" of return to the unit exists, will illustrate this point.

First of all, however, we must be clear about what Members Jenkins and Walther mean by "reasonable expectancy" in the circumstances of this case. Smith and the Union take the position that Kiefer owed the Union dues for the 29-day period between March 16 and April 15, 1974, when he returned to work in the bargaining unit from his supervisory position. Presumably, therefore, Members Jenkins and Walther mean that Kiefer had a "reasonable expectancy" of returning to the unit at the time he first became a supervisor in April 1973.[31]

Thus, it is curious that two of the five facts adduced by Members Jenkins and Walther to show "reasonable expectancy" through frequent movement to and from supervisory positions by unit members involve occurrences *after* April 1973. First, they note that Kiefer spent 29 days in the bargaining unit betweeen

[29] *Idarado Mining Company,* 77 NLRB 392 (1948); *Yellow Cab Company,* 148 NLRB 620 (1964).

[30] As the Board stated in *Modine Manufacturing Company,* 203 NLRB 527, 529 (1973), "it is our understanding of the statutory scheme that our function in conducting, and supervising the conduct of, elections under Section 9 of the Act is essentially an *administrative* function, and partakes but indirectly of the quasi-judicial functions we perform in unfair labor practice proceedings under Section 10."

[31] In deciding voting eligibility, the Board has unequivocally stated that "the test for determining expectancy of recall is the situation as it existed at the time of the election rather than subsequent developments." *Thomas Engine Corporation and Upshur Engine Co., Inc., d/b/a Tomadur, Inc.,* 196 NLRB 706, 707 (1972). Accord: *Zatko Metal Products Co,* 173 NLRB 27 (1968), *D. H. Farms Co,* 206 NLRB 111 (1973) By analogy, any "reasonable expectancy" which Kiefer may have had of returning to the unit must be determined as of April 1973.

periods of supervisory duty. But, use of this fact is "bootstrapping" and circular reasoning of the most obvious kind: because Kiefer was demoted in fact to the unit in March 1974, he had a "reasonable expectancy" of returning to the unit when he became a supervisor in April 1973.[32] Similarly, Members Jenkins and Walther recite the fact that Smith told Kiefer to pay up the union dues obligation he allegedly owed for the 29 days of unit work, so that he would be able to go back to the unit again if necessary. But this occurred in October 1974—after Kiefer already had allegedly become obligated to pay union dues for the period in question. Again, I cannot understand how an event in October 1974 may be used to prove a "reasonable expectancy" as of April 1973.

The only other facts upon which Members Jenkins and Walther rely to establish a "reasonable expectancy" that when Kiefer became a supervisor in April 1973 he would soon return to the bargaining unit are as follows: (1) "Smith has followed a practice of offering supervisory positions to unit members when it finds there is a need for such positions"; (2) "Smith and the Union have jointly required supervisors desiring to return to the unit to be union members as of the date of return"; (3) "Smith's collective-bargaining contracts with the Union, for at least the past 28 years, have contained provisions preserving the seniority rights of employees who leave the unit to become supervisors and permitting employees promoted to supervisor to accrue either full or limited seniority for the time so spent."[33]

There are two problems with basing a finding of "reasonable expectancy" on these facts: they do not suggest a situation much different from that present in *Illinois Bell* itself, and they are totally insufficient to meet the established Board criteria of what constitutes a "reasonable expectancy."

The collective-bargaining agreement involved in *Illinois Bell* also apparently permitted supervisors returning to the unit to retain their prior accumulated unit seniority. From this, it is logical to infer that Illinois Bell also followed a practice of promoting unit members to supervisory jobs; otherwise, such a contract provision would be completely unnecessary. The fact that Smith and the Union have jointly required supervisors returning to the unit to be union members in good standing as of the date of return does not suggest anything more about the frequency of movement between unit and supervisory positions.

The important point, though, is that such facts are meaningless in attempting to show a "reasonable expectancy." The Board requires that laid-off employees have a reasonable expectancy of recall in the near future, based upon objective evidence, to be allowed to vote. *Higgins, Inc.*, 111 NLRB 797 (1955); *Sierra Lingerie Company*, 191 NLRB 844 (1971). Among the objective factors to be considered are "the past experience of the employer, the employer's future plans, and the circumstances of the layoff, including what the employees were told as to the likelihood of recall." *Enterplastics Industries, Inc.*, 217 NLRB 742 (1975); *D. H. Farms Co., supra* at 113.

In the usual case, the Board looks for evidence showing the probable rate of turnover of employees in the plant, the prospects for an improvement in business conditions, and what the employees may have been told about the probable duration of the layoff. Thus, in *Higgins, Inc., supra* at 799, the Board concluded that laid-off employees had no reasonable expectancy of recall because "the record fails to show that there is any definite prospect of business conditions improving in the near future," such as to indicate probable reemployment for those laid off. Similarly, the Board regarded the absence of evidence of a possible improvement in business conditions as decisive in finding no reasonable expectancy of reemployment in *Northwest Plastics, Inc.*, 121 NLRB 815 (1958), and *Pasquier Panel Products, Inc.*, 219 NLRB 71 (1975). In *Owens-Illinois Glass Company*, 114 NLRB 387 (1955), the Board pointed to the lack of evidence showing the probable rate of turnover or improvement in business conditions in finding no reasonable expectancy that laid-off employees would soon return to work. Without information concerning "normal employee turnover," the Board refused to find a reasonable expectancy of reemployment in *Norris Homes, Inc.*, 208 NLRB 706 (1974).[34]

In short, the stipulated record in this case contains no evidence of the type necessary to decide whether

[32] Applying the same reasoning to the facts of *Illinois Bell*, one would conclude that because Galka eventually returned to the unit from a supervisory job he had a "reasonable expectancy" of doing so at the time he became a supervisor.

[33] Although other facts are stated in the majority opinion, they are irrelevant to the issue of "reasonable expectancy," and are thus devoid of legal significance

I disagree with Members Jenkins and Walther's statement, made in fn 10, that the five facts on which they rely to show "reasonable expectancy" also indicate that Kiefer, unlike the returning supervisor in *Illinois Bell*, "assumed his supervisory position, 'with a bona fide intention of not returning [to a unit position].' " The facts in question are all objective facts, which cast no light upon Kiefer's subjective intention, good or bad, in accepting a supervisory position The reference to "bona fide" intention in *Illinois Bell* was made in connection with the observation that the individual's promotion to supervisor was not "for the purpose of evading his obligation to maintain his union membership." There is no record evidence to indicate that Kiefer left the bargaining unit to become a supervisor in an effort to circumvent a lawful union obligation. In any event, *Illinois Bell* is based on the theory that when an individual becomes a supervisor he loses his status as a statutory employee, meaning he must be treated as a "new" employee upon returning to the unit for statutory purposes. Logically, therefore, an individual's intention on becoming a supervisor has no bearing upon his status under the Act.

[34] By contrast, the Board found that six laid-off employees did have a "reasonable expectancy" of recall when they were told that the company had run out of a certain part vital to its manufacturing process, that the part was on order, and that the workers would be recalled as soon as the shipment or

Kiefer had a "reasonable expectancy" of returning to the unit at the time of his elevation to supervisor in April 1973. Kiefer was returned to the unit in March 1974, because of lack of work. But there is no information about what, if anything, Kiefer may have been told in April 1973 about the likelihood that he would go back to the unit, nor about business prospects or any other factor that could conceivably have affected the probable duration of his supervisory service. This reason alone is sufficient to warrant rejection of Members Jenkins' and Walther's opinion.

Members Jenkins' and Walther's further contention, that Kiefer cannot be regarded as a "new" employee, because he was seeking to retain his prior accumulated unit seniority in returning to the bargaining unit, falls of its own weight. The right to retain such seniority is a benefit conferred by the labor contract, and has nothing at all to do with one's statutory status as a "new" employee in these circumstances; i.e., whether one is returning to the unit after spending a period of time as a nonemployee within the meaning of the Act. If there be any doubt on this point, it need only be remembered that the returning supervisor in *Illinois Bell,* as noted, was found to be a "new" employee, even though he reentered the unit with "carryover seniority" as provided in the collective-bargaining contract.[35] Thus, it is difficult to understand how Members Jenkins and Walther can distinguish *Illinois Bell,* which they purport to uphold, on the novel ground that a "new" employee is one who does not retain prior accumulated seniority upon returning to the unit.

Furthermore, the implicit assertion that a supervisor returning to the bargaining unit should be treated as a "new" employee only if he retains no previously acquired seniority directly contradicts Members Jenkins' and Walther's own "reasonable expectancy" test. Members Jenkins and Walther tell us that the "proper test to be applied here is whether there is a reasonable expectancy that when an individual becomes a supervisor he may soon return to the unit." But whether a person is entitled to retain prior accumulated seniority in returning to the bargaining unit says nothing about whether he has a "reasonable expectancy" of returning to the bargaining unit at the time he leaves it to become a supervisor. For example, suppose an employee is told by his employer at the time of his elevation to supervisor that the promotion is permanent, and thus there is no "reasonable expectancy" that he will ever go back to the unit. Nevertheless, some years later, this person is sent back to the unit, and is entitled to receive his previously accumulated unit seniority under the terms of the collective-bargaining agreement. Under Members Jenkins' and Walther's "carryover seniority" approach, such an individual obviously would not be a "new" employee; under their "reasonable expectancy" test, however, this person would be entitled to "new" employee status, because there was no "reasonable expectancy" that he would soon return to the unit as of the time he became a supervisor. Members Jenkins and Walther cannot have it both ways.

Finally, Members Jenkins' and Walther's apparent concern that finding violations in this case would permit supervisors returning to the unit to take 30-day "free rides" each time they return is ill founded, because the possible financial repercussions for unions are easily resolved by the decision in *Metal Workers' Alliance, Inc., supra.* The Board held in that case that a union is entitled to charge disparate reinstatement fees for individuals returning to the unit, based upon the length of their absence from the unit and upon their right to "immediate enjoyment" of prior seniority and other rights and benefits.[36] Therefore, Smith Steelworkers, or any other union, need only amend its constitution to charge higher reinstatement fees for supervisors returning to the unit, in accordance with the *Metal Workers* ruling, and it can more than make up for the occasional loss of 1 or 2 months' dues. Thus, the "free ride" argument lacks merit.

For all practical purposes, Members Jenkins and Walther have overruled *Illinois Bell* today and replaced it with a theory at odds with the statute as well as the facts of the instant case, and which, in addition, is unnecessary to achieve the objective sought.

Member Fanning's concurring opinion also fails to supply an adequate rationale for the result in this case. Contrary to his assertion, "whether an employer and a union may provide that an employee who leaves the bargaining unit for a supervisory position may be returned to the unit at a later time with the same employment status enjoyed by him at the time he left," i.e., whether the contract may provide that an individual may return to the unit with full

parts arrived. *Enterplastics Industries, Inc, supra.* This case illustrates the stringency of the "reasonable expectancy" test.

[35] The Board's exact language on this point in *Illinois Bell,* 200 NLRB at 1053, is worth quoting in full: "[W]hile it is true that under the contract for seniority purposes Galka was credited with his earlier employment within the unit, the fact is that, upon assuming the supervisory position with management, Galka severed his employee relationship within the bargaining unit under the contract. At that point, he removed himself from the status of an employee to that of a supervisor within management. While, in the strict sense of the word, it could be argued that Galka continued in the employ of the Company, certainly he did so not as an employee."

[36] In *Metal Workers,* the union constitution required a reinstatement fee of $50 for those individuals returning to the unit after an absence of up to 1 year, $100 for those returning after an absence of 1 to 2 years, and $150 for those returning after 2 or more years away from the unit. A $5 initiation fee was required of first-time employees

seniority rights, is not an issue in the case. There has never been any question that such a clause in a collective-bargaining agreement is legal, and no party to this proceeding has made a contention to the contrary. In any event, it is an absolute *non sequitur* to say that because it is legal to provide for retained seniority for individuals returning to the unit it is also legal to deny these individuals the 30-day grace period required by the statute.

I must likewise reject Member Fanning's view that new employment status is a factual question in cases such as this, and that a collective-bargaining contract may determine such status rather than the Act itself. If my concurring colleague is correct that one is not a new employee if he receives "seniority rights and other benefits earned by virtue of past employment," I fail to see how he can rely on, or indeed distinguish, *Illinois Bell,* in which, as I have noted more than once, an individual was held to be a "new" employee in precisely such circumstances.

Further, a superficial reading of *Idarado Mining Company, supra,* and *Yellow Cab Company, supra,* referred to by Member Fanning, discloses that they directly support the proposition that employment status, for purposes of the statute, is terminated upon departure from the bargaining unit, and that the 30-day grace period applies upon future reemployment in the unit. Thus, in *Yellow Cab,* the Board stated that, as in *Idarado,* "the obligation to remain a union member in good standing, *as a condition of employment,* 'was not merely suspended' but ended when the employee quit his job." 148 NLRB at 624 (Emphasis supplied.)

Yet Member Fanning quotes the following sentence from *Yellow Cab* to suggest that employment status under the Act can be determined by contract: "The governing contract in each instance [as in *Idarado*] is the measure of the employee's responsibility." 148 NLRB at 624. The remainder of the paragraph in which the sentence appears shows plainly that the Board meant that the maintenance-of-membership clause involved in *Idarado* required that the individual returning to the unit be given the opportunity to decide whether to join the union at all, while the union-security clause present in *Yellow Cab* required that the individual be given 31 days to join the union if he wished to continue working for the employer. Consequently, Member Fanning's selective quotation of the sentence referred to above leaves the wholly false impression that the Board in *Yellow Cab* intimated that the parties to a collective-bargaining agreement may provide that an individual returning to the bargaining unit can be required to be a union member in good standing and to resume the payment of dues immediately upon his reentry into the unit despite the statutory 30-day grace period.

Finally, I am puzzled by Chairman Murphy's reasoning in deciding that the complaint herein should be dismissed. She states: "I would treat the practice of the parties under their contract as tantamount to an agreement or arrangement between them to grant an indefinite leave of absence from the unit to employees promoted to supervisory status so that they will be able to retain their unit seniority and attendant rights in the event of their return to the unit." This concept appears to be a complete contrivance having nothing to do with the facts of the case. Thus, it is ironic that the Chairman states by this creation she is avoiding "the dissent's fiction that the parties must treat these individuals as 'new' employees for union-security purposes, despite their continuous employment relationship with Smith."

There are two main difficulties with the Chairman's approach aside from its imaginary character. In calling it a fiction to recognize that supervisors returning to the unit are "new" employees, Chairman Murphy is obviously confusing the statutory definition, which excludes supervisors from the term "employee," with the common or colloquial definition of "employee"; i.e., one who works for another person or for a business entity. As explained in detail in this dissent, a supervisor is a nonemployee for purposes of the Act as much as an individual who is not paid by the employer at all. Thus, someone entering the unit from a supervisory position, as much as an individual entering the unit from outside, must be provided the 30-day statutory grace period.

In addition, the Chairman's rationale does not square with the realities of a grant of a leave of absence to an employee. To me, a leave of absence indicates that the individual receiving it will be absent from the employer's operations altogether for a period of time, not merely working in a different capacity for the same employer. Such an individual's status under the Act would not change while he is on leave. However, as repeatedly noted, an individual who becomes a supervisor loses his status as an employee by operation of the Act, and it is thus contradictory to describe such an individual as an employee who is on a leave of absence during supervisory service.

It seems to me that underlying the result reached by my four colleagues is the premise that arrangements such as that between Smith and the Union may be convenient and beneficial to both parties, and thus that the Board should not stand in the way of their fulfillment. But it is not our right or duty to reach a result simply because it is desired by both management and labor. The Act guarantees employees certain rights which both employers and unions may find inconvenient or not to their benefit to respect. Our obligation, though, is to see that individual

employee rights are insured even in the face of united opposition from labor and management. It is clear to me that meeting this responsibility in the instant case requires a finding that Smith and the Union violated Section 8(a)(3) and (1) and Section 8(b)(1)(A) and 8(b)(2) of the Act, respectively, by refusing to return Kiefer to the bargaining unit with his accrued seniority because he failed to pay union dues for a period during which he had no legal obligation to pay.